United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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P/S

74-1589

To be argued by
PAUL I. AUERBACH

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES W. FREDRICKSON,

Defendant-Appellant.

ON APPEAL FROM THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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STATEMENT OF THE CASE AND DISPOSITION

The appellant was indicted upon three counts for violation of the Federal Tax Law, Title 26, § 7201 I.R.C. 1954. He was accused of a willful attempt to evade tax payments for the years 1964, 1965, and 1966. The present trial was a re-trial of the Appellant on the same counts by the same Court, the first proceeding ending in a mistrial when the jury failed to agree upon a verdict.

In the present trial, which was held on the 19th day of February 1974 before the Hon. Madam Justice Constance Baker Motley, the appellant was found guilty of violating the statute in question on all counts and he was sentenced by the Court on the 16th day of April 1974. When appellant's counsel filed his Notice of Appeal, the trial Judge attempted to have the Federal officers execute the sentence immediately. However, upon the oral request of appellant's counsel on the same date, the trial Judge agreed to allow the appellant to remain at liberty for one week during the filing of papers requesting release pending Appeal pursuant to Rule 9(b) of the Federal Rules of Appellate Procedure. The appellant was subsequently granted release pending the disposition of this Appeal.

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STATEMENT OF FACTS

Appellant, Charles W. Fredrickson, is an attorney with a small private practice in Tuxedo, New York. In the course of his practice, he administered the affairs of Mr. and Mrs. Lee, an aged couple residing in the community. Because of the Lees' advanced ages and the fact that they were both ailing, they gave the appellant their power of attorney so that he could manage their checking account.

During this time the appellant's practice was growing very slowly. He was not very successful by any reasonable standards, and his marriage was falling apart. (Transcript Pages 128, 129, 130, 131)*. Recognizing that the cause of his professional and personal problems was psychological, Mr. Fredrickson sought release from a qualified psychotherapist. He has been under treatment for several years in order to relieve specific symptoms, which fall under the diagnosis of dissociative reaction.

In the fall of 1966, when the Rockland National Bank discovered that Mr. Fredrickson had openly written approximately 890 checks upon the Lees' account for his own use, Mr. Fredrickson signed a Confession of Judgment and began immediately to repay the money owed to the Lees. He has since repaid more than forty per-cent of the debt to the Lees, and subsequently to the Estate. (Tr. Page 24 and Page 66). None of the parties has ever

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* Numerical references within parenthesis refer to the original transcript pages.

pursued a course of conduct which would indicate that Mr. Fredrickson was criminally responsible for the misappropriated funds.

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I. ARGUMENT - EVIDENCE OF COLLATERAL CRIMES

Evidence of a collateral crime, the crime of embezzlement, was admitted over objection and without proper instruction as to its use and limitations. The appellant has never been convicted of this crime nor has he ever admitted committing such a crime.

A. GENERAL RULE GOVERNING ADMISSIBILITY

The general rule governing the admissibility of this highly prejudicial type of evidence makes its admissibility dependent upon its verification, its relevance, and proper instructions by the Court as to its use. U.S. v. Skidmore, 123 F.2d 604, (C.A.Ill. 1941); cert. den. 315 U.S. 800, 86 L.Ed. 1201; 62 S.Ct. 626; U.S. v. Taylor, 305 F.2d 183 (C.A. 4th Cir. 1962); cert. den. 371 U.S. 894, 9 L.Ed. 2d 126; 83 S.Ct. 193, reh. den. 371 U.S. 943, 9 L.Ed. 2d 277; 83 S.Ct. 322.

> In U.S. v. Taylor, an attorney was charged with violating the same statute as in the case at bar. Upon cross examination, the defendant in Taylor stated that he was audited by state revenue agents and had paid some additional State tax. This evidence was only admitted when the Judge told the jury that answers to these questions could only be considered as relevant to the determination of his intent when he filed the tax return. Strict limitations were imposed for the use of this information.

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In the case at bar, instead of giving adequate instructions and laying down proper precautions to the use of damaging statements about alleged embezzlements by the appellant, the Court, in fact, indicated its own confusion as to the nature of this evidence. (Tr. Page 29). The Court consistantly confused and wrongfully mingled the specific intents required for violation of the state embezzlement statutes and the tax statute in question. Title 26, §7201 I.R.C. 1954.

When appellant's counsel tried to qualify the Government's witness' usage and understanding of the prejudicial term, "embezzlement", the Court refused to allow this line of examination. (Tr. Pages 66 through Page 69; Page 77 through Page 88). The Court's own confusion about specific intent became very clear when it first told the jury that the jury would have to decide whether or not the appellant embezzled the money or took the money by mistake, and later instructed this same jury that because the money was taken by mistake, as a matter of law it was taxable income. (Tr. Pages 66, 88, 245).

B. MEANS OF ESTABLISHING COLLATERAL CRIME

In every prosecution for violation of the statute in question, where proof of prior criminal conduct was relevant to the

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issues in question, this proof was conclusively established by one of three means: either it was established by a prior criminal conviction of the related crime; or it was established by an admission of the defendant in the tax proceeding to his guilt of the related crime; or the issue of the related crime was left for the determination of the jury so that the jury could connect the related crime with the specific intent required in the tax proceeding. A close examination of the major cases on this issue reveals no deviation from the above procedures for establishing the collateral crime. James v. U.S., 366 U.S. 213, 81 S.Ct. 1052 (1961); U.S. v. Bruswitz, 219 F.2d. 59 (C.A.2, 1955); cert. den. 349 U.S. 913, 99 L.Ed. 1247, 75 S.Ct. 600; U.S. v. Siano, 356 F.2d 927 (1966); U.S. v. William J. Rochelle, 384 F.2d 748 (C.A. 5, 1967); cert. den. 390 U.S. 946, 88 S.Ct. 1032, 19 L.Ed. 2d 1135; U.S. v. Dawson, 400 F.2d 194 (C.A.2, 1968); cert. den. 89 S.Ct. 632 (1968); U.S. v. Rosenthal, 454 F.2d 1252 (C.A. 2, 1972); Buff v. Comm. Internal Revenue, (C.A. 2 decided April 5, 1974).

In James, supra, and Siano, supra, there were prior convictions of embezzlement. In Buff, supra, there was an admission by the defendant that he did, in fact, embezzle the money. In Rosenthal, supra, the defendant allegedly bought airline tickets on his credit card and then sold these tickets at a discount. During the trial, a question of his intent to repay the airline was raised. The Court held that this intent was a question to be decided by the jury under proper instructions. It also stated that the test laid down in James

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included sophisticated procedures for obtaining property by fraudulent means as well as cruder methods of dipping the hand into the till. The James test was stated simply as the determination of whether the funds were acquired "without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition." This test has been applied uniformly in all the cited cases, but only when the "wrongfullness" of the acquisition was previously established. In Rochelle, the defendant was previously convicted of an S. E. C. violation.

In Dawson, supra, the defendant was the Chairman of a local political committee. The Court, in the tax proceeding, left to the jury the question of whether or not the defendant did in fact use income received for the political party for his own advantage and benefit.

In Bruswitz, supra, the defendant's prior acts could have been characterized as embezzlement or as commercial bribery. There had been no prior conviction of either crime. The question of the defendant's prior conduct was left for the consideration of the jury in the tax proceeding. The Court explicitly recognized the legal problems involved in characterizing the prior conduct.

In the case at bar, the jury was instructed as a matter of law that the income had been taken by mistake because

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the Judge erroniously characterized Mr. Fredrickson's defense as one solely of mistake. (Tr. Page 245). This same jury had been previously told that the question of mistake or embezzlement was for them to determine. (Tr. Page 88). In the words of Judge Motley, ". . . the jury is not bound by anybody's conclusion as to whether a crime has been committed or has not been committed, and that is one of the things that the jury here is going to have to determine, whether the money was taken as a result of embezzlement or whether the money was taken by Mr. Fredrickson as the result of an honest mistake. This is what you have to decide." The affect of these damaging inconsistent instructions to the jury could only result in confusion and an inability to decide the issues on their merits.

II. "UNAUTHORIZED LOAN DEFENSE"

The Court's erroneous and prejudicial exclusion of the appellant's "unauthorized loan defense" precluded Mr. Fredrickson, at the outset, from obtaining a fair trial.

A. QUESTIONS SURROUNDING RECEIPT OF FUNDS, A JURY MATTER

In a prosecution for violation of the tax evasion law, the questions surrounding the circumstances of the receipt of the funds and the subsequent characterization of these funds as income or loan are matters for a jury. Bruswitz, supra; Canton v. U.S., 226 F.2d 313; cert. den. 350 U.S. 965, 100 L.Ed. 838 (C.A. Minn. 1955); 76 S.Ct. 433; Jonson v. U.S., 281 F.2d 884 (C.A. Wash. 1960).

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In Bruswitz, the question of whether or not alleged kickbacks constituted taxable income was left to the jury.

In Canton, the question of whether the funds in question constituted gifts or income was left to the jury.

In Jonson, the argument was more complex but bears directly upon the case at bar. The defendant in Jonson alleged that he worked out a compromise of his criminal liability with the Internal Revenue agents, thereby converting such liability into the civil liability of a debt. The Court held that any evidence that would tend to support the defense of a compromise settlement was a question solely within the province of the jury. In the case at bar, the circumstances surrounding both parties' recognition that an amount of money was indeed owed by Mr. Fredrickson to the Lees, should have been left as a question for the jury to determine. Whether or not there was a mistake or an embezzlement or wrongful conduct was a question for the jury. The James test which concentrated on the presence of consensual recognition, either express or implied, did not set down the time for this recognition of the obligation to repay or any rigid standards which would preclude this defense of "unauthorized loan" from the province of the jury.

The Buff Court threw out the defense of unauthorized loan because the Court claimed that the Judgment was not worth the paper upon which it was written. Buff at Page 3, the Court

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cited the absence of any substantial repayment in Buff. In fact, only about $1,100.00 of a $22,000.00 debt was repaid in Buff. This amount is certainly not a substantial amount.

In the case at bar, as soon as both parties were apprised and became fully aware of the consequences of Mr. Fredrickson's actions, there was immediate recognition by both that a debt was extant. In the case at bar, as in the case of U.S. v. Merrill, 211 F.2d 297 (C.A. 9, 1954), there was evidence of the bona fides of the intent to repay and the fact of actual repayment. From an original debt of approximately $79,000.00, there remains to be paid here approximately $43,750.00. These figures certainly indicate substantial repayment. Also, in the case at bar, the Confession of Judgment was listed as an asset of the Lee Estate in an Estate Tax Return filed on January 14, 1969, which would certainly indicate it had value.

B. DUTY OF TRIAL JUDGE TO FAMILIARIZE HERSELF WITH DEFENSE

When a defense has been submitted to several Federal Courts and analized in detail by these Courts, it is incumbent upon a trial Judge to familiarize herself with this defense. A failure to understand this defense at the first trial should have resulted in the self-disqualification of the Judge at the second trial. The Judge, however, stated at the very inception of the proceeding, that she did not understand this defense at the first trial and did not understand it at the present trial. (Tr. Page 2, Page 17, Page 21, Page 22). The trial Judge

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erroneously limited and characterized the defense as solely that of mistake and so instructed the jury. The trial Judge's unfamiliarity with the defense and her inability to handle this defense upon two occasions resulted in the highly prejudicial exclusion of a proper defense, a defense which was, in fact, analyzed and treated on prior occasions by other Federal Courts. Merrill, supra, and Buff, supra.

III Erroneous Interpretation of Rules of Evidence

The erroneous interpretations of the rules of evidence constituted a pattern of error leading to a prejudicial and unfair proceeding.

A. EVIDENCE AS TO MENTAL CAPACITY

The Court's refusal to permit the introduction of evidence as to the appellant's mental capacity, when such evidence was obtained as a result of the witness' observation of various transactions was erroneous.

A witness, in addition to describing significant instances of a party's conduct, may testify as to his opinion of the party's mental capacity formed as a basis of such observation. Turner v. American Security and Trust Co., 213 U.S. 257, 29 S.Ct. 470, 53 L.Ed. 788.

In the case at bar, the Government's chief witness had stated in an Affidavit submitted to the Internal Revenue

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Service on August 27, 1971, that the checks drawn by Mr. Fredrickson had been drawn without criminal intent. He believed that Mr. Fredrickson's acts had been the result of severe emotional stress and a confused mind. The trial Court did not permit appellant's counsel to explore this line of questioning. This evidence could have been used for several purposes, including that of impeachment. Appellant's counsel specifically attempted to introduce this evidence on the issue of specific intent but the Court struck down any attempt to introduce this evidence for any purpose whatsoever. (Tr. Page 77 through 82).

B. "BEST EVIDENCE" RULE

A typewritten schedule which purportedly contained the dates and the amounts of checks issued by the appellant was admitted into evidence in violation of the "Best Evidence Rule". This rule states that whenever the terms of a writing which may be material are sought to be proved, the original writing must be produced unless shown to be unavailable. Herzig v. Swift & Co., 146 F.2d 444, Syl. 2 (C.A. 2, 1945).

In the case at bar, the chief prosecution witness stated that although he was present when the original handwritten schedule was constructed, he did not recall comparing the original with the typewritten schedule which was introduced into evidence, nor did he offer any excuse as to the nonproduction of the original schedule. (Tr. Page 39 through Page 40).

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C. Past recollection recorded, business records, work sheets

Testimony was erroneously admitted as to a conversation which purportedly took place between the Government's chief witness and an alleged agent for the appellant when no proper foundation was laid for the introduction of this testimony. The Court's confusion as to the nature of this evidence and its proper characterization was manifest. (Tr. Page 50).

C.1 Proper Foundation

A record of a witness' past recollection may be introduced only after a proper foundation has been laid. One of the elements of this foundation is verification of the item at or near the time it was made. Maxwell's Executors v. Wilkinson, 113 U.S. 656, 5 S.Ct. 691, 28 L.Ed. 1037 (1885). At Page 50 of the transcript, the Court clearly labeled Mr. Watson's evidence as the witness' "recollections past recorded". The witness testified that he ordinarily reviewed typewritten copies which someone else made from his dictated material. He did not, in fact, testify, and appellant's counsel was repeatedly interrupted when he attempted to get the witness to testify, that he did in fact review the typewritten memorandum and certify it as correct. No testimony was offered as to the validity of the purported transcription of the tapes or as to the nature of any verification which may have been made. He only testified as to his usual procedures and this is not sufficient for the admission of past recollections recorded.

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Since the notes were not introduced into evidence it is manifestly unclear as to what kind of testimony this was. The Court did nothing to clarify this. This testimony would not even be admissable in terms of ordinary business records since there was no testimony that the memorandum was made or verified at the time of the transaction. Burger v. U.S., 262 F.2d 946, (C.A.Mo. 1959), cert. den. 79 S.Ct. 1119, 359 U.S. 990, 3 L.Ed. 2d, 979; reh. den. 79 S.Ct. 1446, 360 U.S. 940, 3 L.Ed. 2d, 1552. Because of the lact of identification and verification the testimony offered could not be admitted or supported in terms of records made in the ordinary course of business or as work papers. Hartzog v. U.S., 217 F.2d 706, (C.A.S.C. 1954); Olender v. U.S., 210 F.2d 795, (C.A. Cal. 1954).

IV. Status as attorney

The appellant's status as an attorney was erroneously held against him as a matter of law on the issue of willfulness and used as a basis for denial of appellant's motion to dismiss for failure to prove a prima facie case.(Tr. Page 96, Page 195).

A Federal Court recently took judicial notice of the fact that most attorneys have only scant knowledge of the tax laws. Burstein v. U.S., 395 F.2d 976, (C.A.5, 1968). Another Federal Court on a prior occasion, did permit the jury to consider the defendant's understatement of income in the light of his professional attainments as an attorney. U.S. v. Alker, 260 F.2d 135, (C.A. Pa. 1958); cert. den. 359 U.S. 906, 79 S.Ct.

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579, 3 L.Ed. 2d 571; reh. den. 359 U.S. 950, 3 L.Ed. 633, 79 S.Ct. 732. In Alker, however, this issue was not used against the defendant as a matter of law, but was presented to the jury as merely one circumstance for their consideration.

In the case at bar, the Court denied the appellant's motion upon this basis, prompted by the Government (Tr. Page 195), and in its sentence, made disparaging reference to white collar crimes which go unpunished, thus further utilizing appellant's professional status in a prejudicial manner. New York Law Journal, Page 1, April 17, 1974.

Furthermore, in the case at bar, when appellant's counsel attempted to question the Government's chief witness, an attorney, as to his knowledge and usage of the legal term, "embezzlement", he was prohibited from doing so. (Tr. Page 68). The Court cannot have it both ways. Either an attorney is charged, by virtue of his professional status, with specialized knowledge, or he is not. This Court was manifestly confused on the issue. If the Government, with the active help of the Court, was permitted to impute special knowledge of the laws to Mr. Fredrickson because he was an attorney, then, Mr. Fredrickson's counsel should have been permitted to impute this specialized knowledge to the Government's chief witness, who was also an attorney.

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V Prejudice from Record as a whole

It is the appellant's contention that although the errors of law already indicated are per se evidence of an unfair and unconstitutional proceeding, there emerges from an examination of the record as a whole, manifest factual evidence of the trial Judge's prejudice and inability to deal with these proceedings in an impartial manner. These errors include both inconsistent statements to the jury revealing a confusion on the part of the Court, and disparagement of the defense.

A. ARGUMENT AND IRREGULAR STATEMENTS BY TRIAL COURT

It is irrelevant whether guilt may be spelled out of a record. The test is rather "whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the Federal Courts." Bollenbach v. U.S., 326 U.S. 607, 90 L.Ed. 350, 66 S.Ct. 402 (1945); Sunderland v. U.S., 19 Fed. 2d 202 (C.A. 8, 1927). In Bollenbach there was present both disparagement of the defense as well as errors in the Judge's charge.

In Sunderland, the Judge's charge was found to be argumentative in favor of the prosecution and highly prejudicial.

In the case at bar, the trial Judge originally stated that it was the function of the jury to determine whether the funds were taken as the result of embezzlement or whether the money was taken as the result of an honest mistake. (Tr. Page 88). In

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both cases if embezzlement had been established, or the money had been taken as the result of mistake, there might have been a basis for charging that the income was taxable as a matter of law. However, the crime of embezzlement had never been established and the defense of mistake was not the sole defense offered. A major defense of the appellant was never permitted to be introduced, namely the defense of an unauthorized loan.

In her charge, the trial Judge erroneously characterized the defense as predicated solely upon mistake and charged the jury as a matter of law that money received by mistake is taxable income. The results of this manifest inconsistency and confusion as to the law could only serve to confuse the jury and result in the exclusion of a major defense of the appellant.

B. MISHANDLING OF DEFENSES RELATED TO SPECIFIC INTENT

The complex evidence offered to controvert the specific intent required by the revenue statute was misunderstood and disparaged by the trial Judge in her charge. Her treatment of the expert opinion offered by the appellant was argumentative and weighted in favor of the Government. (Tr. Page 237, Page 238). In Sunderland, supra, the trial Judge disparaged the defense and gave argumentative instructions to the jury, said arguments being weighted in favor of the Government.

In the case at bar, the complex physchological testimony on the emotional instability and lack of specific intent of the

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appellant was referred to by the trial Judge in an oversimplified and grossly prejudicial manner which could only serve to inflame the jury against this proffered testimony (Tr. Page 249). The expert witness had testified that it was his opinion that the appellant was suffering from what is known as a dissociative reaction which could lead to memory blockages, blackouts, and various other symptoms. The trial Judge, in her attempt to recapitulate both the testimony of the expert and that of the appellant, said that the appellant's testimony was that he was "emotionally upset and just simply forgot". (Tr. Page 249). The difference between a total lack of awareness and the simple act of forgetting is too large to allow a trial Court to trample over expert testimony in this situation.

This attitude had been apparent from the inception of the proceedings when the Judge summarily denied appellant's requests on the voir deire. She refused to ask questions relating to the jurors' preconceptions about psychiatrists as opposed to psychologists or as to general psychological testimony as opposed to the concrete results of psychological tests.

This refusal resulted in the denial of Mr. Fredrickson's right to an unbiased and reasonable trial because it was imperative that counsel ascertain whether the members of the jury could properly evaluate the technical distinctions made by the expert witness upon direct and cross examination. Her denial was merely the first step in the disparagement of the defenses

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offered by the appellant.

At Page 238 of the Transcript, it can be seen that the trial Judge told the jury in three separate statements how it might reject the expert opinion offered without instructing them properly as to how they might accept the testimony. She told the jury, ". . .you may reject an expert's opinion if you find the facts to be different from those which form the basis for his opinion. (Tr. Page 237, Page 238). You may also reject his opinion if after careful consideration of all the evidence in the case, expert and other, you disagree with that opinion.

In otherwords, you are not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony." After this tripartite manner of instructing the jury as to how it might reject Dr. Fabrikant's testimony, the trial Judge did not tell them how they might use it properly. This weighting of the charge was further evidence of the prejudicial and unfair nature of this proceeding. It is the appellant's conclusion that he was not granted his right to a fair, complete, and reasonable trial by a Court of the United States of America for the following reasons.

I. Evidence of collateral crimes

II. "Unauthorized loan defense"

III. Erroneous interpretation of rules of evidence

IV. Status as attorney

V. Prejudice from record as a whole.

The appellant contends that under the standards set down by Justice Frankfurter in Bollenbach and in Sunderland, he did not have a fair trial. The trial Court did not merely exercise it's perogative to direct and control the proceedings but instead denied the appellant a fair opportunity, through his counsel, to outline his complicated, yet plausible defenses to the jury. The trial Court became, in effect, "either an assistant prosecutor or a thirteenth juror." For these reasons, the appellant demands either a dismissal of the charges against him or the opportunity to present his legal defenses in the atmosphere of a fair, reasonable, comprehending, and unbiased courtroom.

He did not have that at this trial.

Respectfully Submitted
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